

NTSB Order No. EA-4221

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 19th day of July, 1994

Docket SE-12644

sustained injury, in violation of 14 C.F.R. 91.13(a).² However, in view of his dismissal of another alleged 91.13(a) violation, and the Administrator's withdrawal of an alleged violation under section 91.127(b)(1), the law judge modified the period of suspension of respondent's pilot certificate³ from 180 days, as requested by the Administrator, to one of 90 days. The Administrator has not appealed from the reduction in sanction. As discussed below, we deny respondent's appeal and affirm the initial decision.

Although the parties presented widely differing versions of the incident which gave rise to this case, certain facts are undisputed. On September 6, 1991, respondent was giving flight instruction in a Cessna 150 in the vicinity of Buehl Field, an uncontrolled airport in Langhorne, Pennsylvania.⁴ Buehl Field has one runway which -- depending on the direction of travel -- is designated as either Runway 24 or Runway 6. Respondent and his student landed on Runway 24 and, after turning around, took off in the opposite direction, i.e., from Runway 6. After

² Section 91.13(a) provides:

§ 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

³ Although the order alleged that respondent was the holder of a commercial pilot certificate, respondent testified at the hearing that he held an airline transport pilot certificate.

⁴ Although his student was operating the controls of the aircraft, respondent was the pilot-in-command.

reversing their direction in flight at least once, they again landed on Runway 24. Upon reaching the end of runway 24, they pulled into a "runup" area off to one side.

These maneuvers were observed by Elizabeth Buehl, the co-owner and operator of the airport, and a student pilot who she was instructing in a PA28-161. Ms. Buehl was concerned about what she viewed as respondent's erratic flight maneuvers, and about his takeoff from Runway 6 when the airport wind tee indicated that Runway 24 was the runway in use. She also indicated a belief that respondent's aircraft might be having mechanical problems because it appeared to have trouble maintaining straight and level flight. Accordingly, she taxied her aircraft down to the runup area where respondent's aircraft was stopped, with the intention of speaking to the pilot of the aircraft about these matters.⁵

Ms. Buehl approached respondent and a verbal confrontation ensued during which Ms. Buehl took issue with what she viewed as respondent's improper use of Runway 6. She asked whether respondent was a pilot, asked to see his pilot's license, and asked respondent to shut down his aircraft engine. When respondent asked who she was, Ms. Buehl identified herself as the owner of the airport but apparently did not give respondent her name. Respondent's student presented his pilot license and logbook, but respondent would not show Ms. Buehl his license, and

⁵ Although respondent admitted he had heard of Ms. Buehl prior to this incident, they did not know each other.

did not shut down the engine in response to her request.

What happened next is in dispute. According to Ms. Buehl, respondent told his student to add power and take off. The student added power, as respondent instructed. At that point she had one foot up on the aircraft's right wheel fairing and was leaning against the open door so that she could reach the student's logbook. When the aircraft began to move, she lost her balance and was forced to hold on to the open door with her elbow through the window, and the bottom of the window in her armpit. She testified that the plane was moving too fast for her to jump off without it hitting her. Respondent then tried to close the door and struck her on the chest three times in an effort to dislodge her from the aircraft. The aircraft came to a stop when Ms. Buehl's student, who had observed the confrontation from inside the other aircraft, ran in front of respondent's aircraft.

Ms. Buehl quickly left respondent's aircraft and returned to her own aircraft where she used the radio to call for the police. She testified that respondent followed her to her aircraft, but retreated when he heard who she was calling.

Ms. Buehl testified that, although she did not think she had been injured immediately following the incident -- and indeed continued to give flight instruction afterward -- she discovered the next day that her arm and neck were hurting, and that she had bruises down the inside of her armpit and right chest, and a cut in her armpit. She testified that she went to the emergency room where an x-ray was taken. She was told her arm was sprained, and

she was given a sling and a prescription for an anti-inflammatory drug.

Ms. Buehl's testimony was corroborated in part by the testimony of her student, James Cherry, and by another student, William McManimen, who was waiting in the airport office at the time of the incident. Although Mr. Cherry admitted he could not hear the conversation over the noise of respondent's aircraft engine, and that his view was partially blocked by the fuselage of the Cessna, he testified that he could see enough to tell that Ms. Buehl and respondent were engaged in a confrontation. He confirmed that respondent's aircraft accelerated with Ms. Buehl hanging on to the plane,⁶ and also said that he thought he saw respondent strike Ms. Buehl. He explained that he felt Ms. Buehl's safety was at risk, so he left Ms. Buehl's aircraft and positioned himself in front of respondent's aircraft's wing to make him stop. He also confirmed that respondent attempted to follow Ms. Buehl when she returned to her aircraft. Finally, Mr. Cherry testified that he ran to the airport office after Ms. Buehl was able to leave respondent's aircraft, to summon Ms. Buehl's husband.

⁶ Contrary to respondent's assertions in his brief that Mr. Cherry said Ms. Buehl was standing on the ground when the aircraft began to accelerate, in contradiction to Ms. Buehl's testimony that she was already hanging on to the aircraft, their testimony is consistent on this point. Ms. Buehl made clear that she had one foot on the wheel fairing and the other foot on the ground when the aircraft started to accelerate. Similarly, Mr. Cherry testified that when it began to move he saw "her one leg just went right out, and she was hanging onto the aircraft." (Tr. 116, emphasis added.)

Mr. McManimen did not observe the incident itself, but testified that when Mr. Cherry ran into the office looking for Mr. Buehl, he "could tell something was wrong [by] the look on his face." (Tr. 159.) He also testified that when Ms. Buehl entered the office a short time later she was walking faster than normal, and she immediately started making phone calls to the police and to the Trenton air traffic control tower (towards which respondent's aircraft was seen to depart).

Respondent and his student denied that the plane was moved while Ms. Buehl was near it, or that respondent struck Ms. Buehl.

Rather, they claimed that Ms. Buehl was the aggressor, in that she tried to reach into the aircraft and turn off the ignition, and that respondent merely put his arm up to block her from reaching the keys. They claimed that respondent then shut the engine off and got out of the aircraft. Respondent explained that he simply wanted to disengage himself from the situation and therefore suggested they go back to the airport office, to which Ms. Buehl agreed. However, as soon as Ms. Buehl's aircraft was clear of the runway he took off and departed.⁷

The law judge recognized that the case turned on credibility, and phrased the issue to be decided as "who are you going to believe?" (Tr. 331.) He then made a credibility determination in favor of the Administrator's witnesses, noting that their testimony was corroborative of one another.

⁷ Although not directly relevant to the violation here at issue, we note that Ms. Buehl claimed respondent's aircraft took off over her aircraft while she was still on the runway.

Specifically, he noted that Mr. Cherry saw what happened, and that Mr. McManimen testified that Mr. Cherry was "quite upset, distraught" when he entered the office. (Tr. 332.) Regarding the alleged injury to Ms. Buehl, he indicated that he found no reason to disbelieve her testimony that she sustained injury to her chest and arm as a result of the incident. Accordingly, although he acknowledged that there were some discrepancies in the testimony,⁸ and that "[t]here was a lot left to be desired about [Ms. Buehl's] approach and attitude" toward respondent, the law judge nonetheless concluded that the Administrator's evidence was sufficient to establish the allegation at issue (i.e., that respondent had operated an aircraft in such close proximity to Ms. Buehl that she sustained injury). (Tr. 332-34.) Thus, the law judge affirmed the section 91.13(a) violation, but in view of the withdrawal and dismissal of additional allegations, modified the sanction to a 90-day suspension.

On appeal, respondent challenges the law judge's credibility finding, arguing that the law judge gave insufficient reasons for that finding. He takes issue with the investigating FAA inspector's stated belief that Ms. Buehl's credibility was established when she became an FAA-designated examiner, arguing that there is no basis for such a conclusion. Respondent appears to argue that the law judge's credibility determination in this case should have been based on an evaluation of the various

⁸ In our view, any discrepancies in the accounts given by the Administrator's witnesses are immaterial.

witnesses' ability to perceive the events testified to. In that regard, respondent asserts that Mr. Cherry's visual perception was obviously flawed because he admittedly initially mistook Mr. McManimen for Mr. Buehl when he ran into the airport office after the incident. Respondent also discounts the value of Mr. McManimen's testimony, contending that, contrary to the law judge's finding, Mr. McManimen never said that Mr. Cherry looked "distraught" when he came into the office.

Respondent has not shown any reason to overturn the law judge's credibility determination. We have long held that we will not disturb a credibility finding unless it is shown that the law judge acted arbitrarily or capriciously, or the result is inherently incredible or against the overwhelming weight of the evidence,⁹ factors not present here. There is no indication that the law judge subscribed to the FAA inspector's apparent belief that, because she was an FAA-designated examiner, Ms. Buehl's version of the events should be presumed credible, a presumption which we agree is unwarranted. Indeed, the law judge made clear that his finding was based on the evidence in the record, which we must assume includes an evaluation of witness demeanor.

We disagree with respondent's assertion that Mr. Cherry's momentary belief that Mr. McManimen (who he did not know prior to this incident) was Mr. Buehl (who he expected to find inside the office), indicates that he "had an obvious vision deficiency"

⁹ See Administrator v. Wilson, NTSB Order No. EA-4013 at 4-5 (1993).

(App. Br. at 8). More specifically, we do not think that that misidentification provides any reason to question the validity of Mr. Cherry's perception that respondent's aircraft accelerated while Ms. Buehl was hanging on to the door. Furthermore, we note that the law judge's characterization of Mr. McManimen's testimony as to Mr. Cherry's apparent mental state when he entered the office is fully supported by the record. Although Mr. McManimen did not specifically use the word "distraught" in his testimony, that is exactly the word he used in his letter to the FAA inspector to describe Mr. Cherry's appearance when he came into the office. (Exhibit A-3.)

In sum, we find no fault with the law judge's approach to the credibility issue, and we uphold his finding in favor of the Administrator's witnesses.

Respondent also challenges the law judge's finding that Ms. Buehl sustained injuries as a result of this incident, arguing that such a finding was impermissible without expert medical evidence. We agree with the Administrator, however, that Ms. Buehl's testimony on this point, deemed credible by the law judge, is sufficient evidence to support his finding.¹⁰ Finally, we note that proof of actual injury was unnecessary in this case, as it is well-established that potential endangerment is

¹⁰ Contrary to respondent's argument, Rule 702 of the Federal Rules of Evidence does not require expert testimony under these circumstances. Rather, that rule simply permits such testimony when it would assist the trier of fact in understanding the evidence or to determine a fact in issue.

sufficient to show a violation of section 91.13(a).¹¹

Respondent's actions clearly created a potential danger to Ms. Buehl.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The initial decision is affirmed; and
3. The 90-day suspension of respondent's pilot certificate shall commence 30 days after the service of this opinion and order.¹²

HALL, Acting Chairman, LAUBER, HAMMERSCHMIDT and VOGT, Members of the Board, concurred in the above opinion and order.

¹¹ See e.g. Administrator v. Cannon and Winter, NTSB Order No. EA-4056 at 4 (1994), citing Administrator v. Haines, 1 NTSB 769 (1970), aff'd, Haines v. DOT, 449 F.2d 1073 (D.C. Cir. 1971).

¹² For the purpose of this opinion and order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).